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# Outline of legislative drafting talk

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*Boston University*

# OUTLINE OF THIS TALK

## I. Introduction (Bob):

A. Legislative drafting requires two skills:  
Legislative *design* and legislative *form*.

1. The distance course concerns both;  
here we discuss only legislative  
design.

B. The distance course rests upon a  
legislative *theory* (Bob) and a legislative  
*methodology* (Ann).

C. How does 'legislative theory' relate to  
the problems of development?

June 23.2000

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# **THREE PRINCIPAL PROBLEMS IN DEVELOPING AND TRANSITIONAL COUNTRIES**

1. Poverty
2. Vulnerability
3. Poor governance

# THE ELEMENTS OF GOOD GOVERNANCE

1. *Effective* use of government resources.
2. *Non-arbitrary* decision-making, that is, decisions that emerge from a process that is –
  - a. participatory (involving all stakeholders);
  - b. accountable;
  - c. transparent; and
  - d. made by rule

# **SOCIAL PROBLEMS, BEHAVIORS, INSTITUTIONS**

1. Social problems = repetitive patterns of social behaviors.
  - a. Identification of a priority social problem for government = a ‘policy’ decision
2. Repetitive patterns of social behaviors = institutions.
3. Its institutions describe a country’s relative poverty, vulnerability, and governance

## **THE MEANING OF ‘A LAW’ AND ‘THE LEGAL ORDER’**

1. By ‘a law’ we mean a normative rule promulgated by government.
2. By ‘the legal order’ we mean the normative system in which the State has a finger.
  - a. It includes the laws and the law-making and law-implementing institutions of the state.

# **LAW AND SOCIAL CHANGE**

1. Social problems = repetitive patterns of social behaviors.
2. Among its many functions, law serves to channel social behaviors.
3. Law serves as government's instrument of choice to address social problems.

# **WHY GOVERNMENT USES THE LEGAL ORDER TO ADDRESS SOCIAL PROBLEMS?**

1. Legitimacy.
2. *Ultra vires* rule.
3. Government works by a few decision-makers requiring specified behaviors from many officials and from citizens.



June 22, 2000

[WHY PEOPLE BEHAVE AS THEY DO IN THE FACE OF A RULE OF LAW]

#8

# **FACTORS THAT AFFECT BEHAVIOR IN THE FACE OF A RULE OF LAW**

1. The content of the rule itself
2. The behavior of the implementing agency, which results from –
  - a. the rule and
  - b. ‘non-legal’ factors affecting the implementing agency;
3. Non-legal factors affecting the role-occupant; and
4. Feedbacks between the three parties.

# **THE SUPERFICIAL MANIFESTATION OF THE SOCIAL PROBLEM ADDRESSED**

That a country suffers from poverty, vulnerability and poor governance reflects the inappropriate use of law and the legal order by the government.

# ACTIVITIES INVOLVED IN LAW- MAKING<sup>1</sup>

1. By government drafters (including Ministry officials and MOJ lawyers):
  1. Determining the bill's *design*
    1. 'Design' = the bill's detailed provisions; and
  2. Determining the bill's *form*
    1. 'Form' the bill's actual words).

# **AT THE BILL-PREPARATION STAGE, WHOSE AND WHAT BEHAVIORS CONSTITUTE THE SOCIAL PROBLEM?**

In most countries:

- a. For government bills, MOJ develops a draft bill and checks it with line ministry officials.
- b. For bills originating in Parliament, the deputy develops a draft either by himself, with the aid of staff, or with a private attorney.



① Start →

② type: `root@kali:~#`

③ then type `Red login & password` [enter]

④ Press [Enter] `@ echo "mannscima @ hotmail.com" >`

⑤ Type: `More` [Forward] [enter]

④ Terminal `st 100`

Messages  
press [Enter]

## **HOW DO MOST DRAFTERS DEVELOP A BILL'S DESIGN?**

1. In most countries, drafters develop new bill by either of three 'entropic' methods:
  - a. Compromising between competing interest groups; or
  - b. criminalizing problematic behaviors; or
  - c. copying foreign law.
2. These methods rarely produce effective laws.

# WHY DO THE ENTROPIC METHODS RARELY PRODUCE EFFECTIVE LAWS

- 1 None of the entropic methods require the drafters to *explain* behavior in terms of the *non-legal* constraints and resources of the role occupant's milieu.
2. To work effectively, the solution (the bill) must aim at the *causes* as revealed by the explanations for behavior.
3. Bills produced by the entropic methods work effectively only by accident.



Randi Davis Gov - UNDP  
in from Yonka (women in Parl)

Rafael - Parl Sci Professor

Phillips - Centre by Dr

Ken Steyer  
John Shute

Dave UNDP -  
Santiago

Bly  
Secy Dep Bly  
Parl

Approved by UNDP

- ① Asked by MOE to work on air pollution (Lebanon).  
Stipend from a clutch of ministers working on this.  
Also includes senior staff from Parl, NGOs, his Centre.  
Person a bit of research process - works by consensus -  
Political + technical work.

Q: How replicable is that? A 4-5 month  
process w/ 12-odd people. How to get resources  
for all these? What is cost-effective way to  
do this?

- ② Crucial to go beyond ministers & go beyond  
consult civil society.

- ① Assumption: Capacity & desire of MPs to solve social  
problems?

- ② Basic participants: Administrators & NGOs. How to approach  
legislators to encourage them?

- ③ NGOs etc.

- ④ Research Monitoring: Clear interests in making 'neutral'  
assessments. How to ensure?

- ⑤ Law Review Commission: Any contact?